In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

J. R. MASON,
Petitioner,
vs.
IMPERIAL IRRIGATION DISTRICT (a political subdivision organized and existing under the laws of the State of California) and IMPERIAL IRRIGATION DISTRICT BONDHOLDERS' PROTECTIVE COMMITTEE,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. FACTUAL BACKGROUND OF THE CASE.

The conflict of interest between the private holders of taxable land and the investors in California Irrigation District bonds, and the relative lien priorities created for failure to pay direct ad-valorem taxes

due a county, city, irrigation and other districts, and the junior property rights of the holders of mortgages and other private liens upon the same land, has been the subject of many cases before this Court, and the California Courts. Perhaps no other tax statute has been the subject of more frequent and persistent litigation than the law pursuant to which the bonds at bar were authorized and issued.

Since the decision of this Court in the *Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112 case, each of the 16 other western States located in the arid and semi-arid west has enacted laws more or less similar to the California Wright Act of 1897. The private appropriators of ground rent have never ceased in their attempts to find a way to circumvent the effect of taxes required by this venerable law upon the net ground rent.

Notwithstanding this deep conflict, there have been organized over 100 districts under this law in California, containing about 4,000,000 acres of rural and urban land which is today the most productive and sought after land in the State, due primarily to the wealth creating irrigation systems which have been installed or acquired with money borrowed through the issuance of bonds similar to those at bar, which bonds are in legal effect State Rent Anticipation Trust Certificates guaranteeing to the holder a return of the funds loaned by means of an annual tax, not on the land, but levied in proportion to the value of the land, with interest until paid. *Moody v. Provident*, 12 Cal. (2)389.

The Modesto and Turlock Irrigation Districts afford proof of the practical results of this law. These two districts contain about 250,000 acres, which was in very large holdings, when the districts were organized in 1887. Those districts have since put out twenty-two bond issues, with the proceeds of which they have constructed great water storage dams, hydro-electric power plants, canals and incidental public works. In *Herring v. Modesto Irr. Dist.*, 95 Fed. 705, it was earnestly contended by counsel that the land in that district could not, and never would be able to supply revenues adequate to service the then outstanding bonds. But, since then, the bonds there at bar have been all paid, with interest, and many more bond issues have been put out by that district, and the district has long had surplus funds with which it has attempted to acquire its bonds before their maturity, and the Court may take judicial notice that banks and investors are today bidding for the 6% bonds of that district prices to yield 2% and less interest, on the money invested.

The annual levy of the tax upon the value of the land has served to apply an effective pressure upon all private holders of land within the districts to put the land to its appropriate use, or to sell the title-deed to others who can and will suitably make use of the land. The annual tax is so levied that absentees holding land idle or under improved must pay as much money to the district each year, as those who hold other land of equal fertility and value highly improved. There is no toll for water actually used by

any land holder, except the annual tax, and those who build upon or otherwise improve their land are not taxed on account of any such improvements. This pressure has operated to force the break-up of big land-holdings, until today the average size of the farms and orchards in these two districts is only about 30 acres. But it was not done without many hard struggles.

This saga of local self government has been accomplished without a trace of regimentation, and by a wholly constitutional and democratic process. Speculators in land-titles have learned from costly experience to keep out of California irrigation districts with a duty to levy and collect a substantial portion of the rent value of land, as taxes to keep alive and to repay money borrowed. The larger the tax that must be paid each year, the less net rent remains after taxes, for the private title-holder to appropriate as unearned increment, and capitalize into price demanded for the land-title. The operation of this law, therefore, serves as an effective ceiling on rent, which can be demanded from home and farm seekers, and retained by private interests. No decrease of this annual tax will benefit a land user, as user, and it will only serve to unlawfully and unjustly enrich the title-holders, as owners, who will thereafter be enabled to privately appropriate more of the ground rent, after taxes, and also to demand and get higher prices for their land-titles from home and farm seekers wishing to acquire a title-deed.

Similar principles of taxation as those embodied in the California Irrigation District Act were endorsed

by the "Housemen of Denmark" in their historic resolution and political manifesto adopted at their annual convention at Koge in 1902, which declared that:

> "As small farms and independent husbandry have proved the most advantageous form of agriculture, in the interests both of the community and the individual, and may therefore be expected to become the most general system of Danish agriculture, our occupation and progress can not be virtually supported by any help from the State or from other classes in the community. We can only prosper if the law fully recognizes that the small holders and all other classes in the community have equal rights.
>
> The small holders, therefore, do not ask for any favours in the way of taxation * * *. We do demand the earliest possible removal of all tariffs and taxes levied upon articles of consumption, such as food, clothes, furniture, buildings, stock, tools (etc.) as all these burdens are pressing with an unjust weight upon labour and the small home.
>
> In place of these taxes, we demand, for the provision of revenue for public needs, the taxation of land-values, which is due to no person's individual labour, but arises from the growth and development of the community, reaches enormous figures, especially in the large towns, and is appropriated as an unearned gain by private speculators who have no title to it, instead of being paid into the public treasuries of the state and municipal authorities. The taxation of land value would not burden labour but, on the contrary, would cheapen land and make it easier for every man to obtain his own home."

A powerful indictment of the obstructive results that speculation in land titles create, when permitted by law is contained in the *"Report on large land holdings in California"* made by the *California Commission of Immigration and Housing* in its second annual report. This report says:

> "Few will take issue with the contention that California should comfortably support many, many times her present population. On the other hand it must be conceded that there have been times during the past few years when it seemed as if California was unable to support even her present limited population. That this paradoxical state of affairs does exist is in itself conclusive evidence of a weak spot in our social structure * * *. Idle and unimproved land seems to constitute one of the safest and most profitable investments. And unfortunately for the unemployed, the investment in land does not need the assistance of labor or require the payment of wages, nor does it compel owners of wealth to bid against each other for labor. Wealth may thus be invested and large gains realized from it by merely waiting, without its owners paying out one dollar in wages or contributing in the slightest degree to the success of any wealth-producing enterprise, while every improvement in the arts and sciences and in social relations, as well as increase in population, adds to its value. By this means we foster unemployment, yet it is considered legitimate business to purchase land for the avowed purpose of preventing labor and capital from being employed upon it until enormous sums can be extracted for this privilege."

The following resolution was adopted by the Board of Directors of Oakdale Irrigation District (Cal.) in 1914:

> "Speculators do not buy land here; each sale is made to an actual settler who brings his family among us, builds a decent home, seeks to better conditions of the neighborhood and adds greatly to the prosperity of our community. Our experience has taught us that the more you relieve improvements from taxation, the quicker will the country improve * * *. Our farmers put the land to its highest use, the use that is most beneficial to the whole community; our system of taxation compels them to do this and they reap a greater profit for themselves * * *.
>
> We make the man who keeps his land idle pay the same as the man who improves."

The U. S. Department of Agriculture in June, 1942, issued a report, *"Non-resident Landlords of Imperial Valley, California,"* by Messrs. Aden Poli and Ralph L. Nielsen, agricultural economists, from which the following is quoted:

> "Imperial Valley, one of the principal farming centers of the West, lies in the extreme southeastern part of California on the Mexican border. Agriculture in the valley, which consists principally of truck, field crop, and livestock farming, is of rather recent origin—development having started some 40 years ago when water from the Colorado River was first diverted into the valley. Since then the valley has flourished from an almost barren and uninhabited desert into an intensively cultivated area of more than 400,000 acres. Because of the mildness of the winter cli-

mate, the long, sunny growing season, and availability of irrigation water, the same land is cropped in many instances two and three times a year, a practice which results in a yearly acreage harvested considerably greater than that cultivated. One traveling through the valley is impressed by its flat, plainlike appearance, its expansive fields of irrigated crops, its network of irrigation canals, the absence of impressive farmsteads and dwellings, and the highly commercialized farming activities which, nevertheless, use large amounts of hand labor.

An analysis of the economic features underlying some of the physical aspects of the valley reveals several unique situations associated particularly with land tenure. Imperial Valley is characterized by large-scale ownership and operation of farm land, a high percentage of tenancy, a high degree of tenant mobility, and a large proportion of non-resident ownership of land.

Considerable non-resident ownership of land has been a characteristic of the Imperial Valley since the early settlement days. In 1910, about eight years after agricultural development was started, almost one-third of the owners were non-resident and controlled about two-fifths of the farm land. An additional 13% was owned by the Southern Pacific Railroad Co., which, if included, increased the proportion of farm land owned by non-residents to more than half.

"From 1910 to 1930 the general trend in the proportion of non-resident owned land was upward, reaching its highest level of about 62% in 1930. Since 1930 the trend has been reversed, dropping to about 46% in 1940.

In 1940, 36% of the owners were non-resident, and they controlled 46% of the farm land in Imperial Valley. About 15% of these non-resident owners were corporations which controlled about 33% of the farm land held in non-resident ownership.

Significant of the large amount of non-resident ownership in the Imperial Valley is its association with (a) an unstable, specialized, commercialized type of farming requiring a large low-wage labor supply; (b) considerable instability and insecurity of land tenure as evidenced by frequent landownership transfers, a high percentage of tenancy, and high tenant mobility; (c) lack of owner interest in land, community, and farm operation; (d) limitation of amount of land available for ownership by individual family-size operators; and (e) the draining of farm income from the valley."

The land rent and tenure matters reviewed in this report involve the land within the taxable jurisdiction of respondent. The facts shown supply convincing evidence that respondent has not begun to exhaust its taxing powers and duties, as construed in

Selby v. Oakdale Irr. Dist., 140 C.A. 171;
Provident v. Zumwalt, 12 Cal. (2) 365;
Anderson-Cottonwood I. D. v. Zinzer, 51 C. A. 582, hearing denied June 25, 1942;
Anderson-Cottonwood I. D. v. Klukkert, 13 Cal. (2) 191;
Fallbrook v. Cowan, supra.

Speaking of the power delegated to Irrigation Districts in California, the Circuit Court said in the *Fallbrook v. Cowan* case, supra:

> "Under the California Irrigation District Act, an irrigation district is declared to be a public corporation with taxing powers and with authority to collect moneys for definite purposes by means of assessments, which are made liens on real property within the irrigation district. The Act provides for enforcement and foreclosure of these liens, by issuance of tax certificates by the tax collector of the district for failure to pay the taxes within the prescribed times, and then, three years thereafter, the issuance of a final deed, which terminates the owner's right of redemption and transfers the absolute title for all purposes to the district, or to a purchaser of either the tax certificate or the land * * *.
>
> (The district officials) could not have extended any statutory right of redemption * * *. Such an option can not be said to have given to the debtor (taxpayer) any property right which is subject to the bankruptcy laws of the United States."

This case involved a petition filed under Section 75 of the Bankruptcy Act, but the same limitation upon the jurisdiction appears in Section 83 by virtue of its express provisions, that the Bankruptcy Court

> "* * * shall not, by any order or decree, in the proceedings or otherwise, interfere with (a) any of the political or governmental powers of the petitioner; or (b) any of the property or revenues of the petitioner necessary for essential governmental purposes; or (c) any income producing property, unless the plan of composition so provides."

The use of the word "interfere" in this context is important. That word has a meaning completely dif-

ferent from "infringe" and is defined in Webster's as follows:

> "To come in collision; to clash; also, to be in opposition; to run at cross-purposes; as *interfering* claims.
>
> To enter into, or take a part in, the concerns of others; to intermeddle; interpose; intervene."

The one and only effect of the death sentence imposed upon the bonds owned by petitioner, will be to release respondent and thus "interfere" with the statutory duty to levy and collect taxes which respondent was under, until entry of the final decree, and which statutory duty and trust respondent will continue subject to, if this petition is granted, and the decree is reversed.

ARGUMENT.

In arguing the questions presented they have been consolidated into six divisions for the sake of conciseness and brevity.

II. THE COURT OF APPEALS ERRED IN SUSTAINING THE FINAL DECREE BECAUSE THE BONDS OWNED BY PETITIONER ARE ORIGINAL, UNREFUNDED BONDS WHICH THE PLAN AFFECTS MORE ADVERSELY THAN THE REFUNDED BONDS WHICH FORMED THE BASE FOR THE CONSENTS TO THE 1939 PLAN OF COMPOSITION.

Although substantially this same question was presented in the *Wells Fargo Bank v. Imperial Irr. Dist.* case, supra, that appeal was from the interlocutory decree, since which opinion, this Court has sustained

the *Wright v. Coral Gables,* 137 F(2)192, conflicting opinion of the Fifth Circuit, which also involved the meaning and intent of Section 83, sub. (j) and in which that Court unequivocally said that where "* * * as here a plan has been entirely completed and it is sought to revise it under changed conditions for the sole purpose of forcibly scaling the debts of non-consenting creditors, the consents of persons holding refunded securities issued under that plan * * *" could not be counted as effective consents under sub. (j).

In *In re C. M. & St. P. & P. R. Co.,* 138 F(2) 235, reversing 121 F(2) 371 the Circuit Court said,

> "Orders of a bankruptcy court are 'interlocutory' until entry of discharge and may be modified and rescinded before final decree and, if no intervening rights will be prejudiced, the court may grant a rehearing."

It will not be suggested that any "intervening rights" will be prejudiced by a reversal in the instant case, and also in the light of the minority opinion by Denman, J., in the *Wells Fargo v. Imperial,* 136 F(2) 539 case, it is submitted that this Court can consider this point at this time, and resolve the existing conflict with the *Coral Gables* case, supra.

III. CREDITOR CONSENT REQUISITE FOR EVERY STEP IN CHAPTER IX PROCEEDINGS EXPIRED BEFORE MOTION FOR FINAL DECREE WAS FILED, BECAUSE THE REFUNDING BONDS UPON WHICH THE CONSENT EXISTED WERE RETIRED AND CANCELLED BEFORE THAT DATE.

This is a basically different point from any that could have been raised in the appeal from the interlocutory decree, because the refunding bonds had not then been all retired and cancelled, by the distribution sale and issuance of *second* refunding bonds subsequent to the entry of the interlocutory decree, but prior to the entry of the final decree. It is clear from the following cases that the consents requisite under the special provisions of Section 83 are essential for jurisdiction to enter any order or decree.

Leco Prop. v. Crummer, 128 F(2) 110;
Ware v. Crummer, 128 F(2) 114;
Spellings v. Dewey, 122 F(2) 652;
Green v. Stuart, 135 F(2) 33;
Wright v. Coral Gables, 137 F(2) 192.

These adjudications appear to sustain the views expressed by Giles J. Patterson, Esq., former chairman of the Municipal Law Section of the American Bar Association, writing in the University of Pennsylvania Law Review, Vol. 90, No. 5, as follows:

> "One of the most important differences between Section 303 and Section 403 is found in subdivision (e) and (f) of the new law * * *
>
> The power of the Federal Court under the act is very different from that which it possesses in proceedings instituted by individuals or private corporations. *This limitation upon its power is*

necessary and applies to every step in the proceedings.

The court can make no order that will even indirectly *interfere* with the sovereignty of the State, *nor compel action by the debtor.*

The Bekins case did not reverse the principle of constitutional law announced in the Ashton case. It re-affirmed it.

Some have assumed that the interlocutory decree may authorize the debtor to make distribution of the new securities. The act provides otherwise. Distribution can be made *only by the court in its final decree. Distribution made before final decree is at the risk of all parties."* (Italics supplied.)

Distribution of the new securities contemplated by the 1939 plan of respondent, here, was made many months before the motion for final decree was submitted to the District Court.

Therefore, the creditor consent requisite for "every step in the proceedings" had expired, and the final decree is *ultra vires.*

IV. THE COURT ERRED IN ENTERING THE FINAL DECREE BECAUSE IT HAS NO SUMMARY JURISDICTION TO DEAL WITH A CONTROVERSY TO STATE PROPERTY OF WHICH THE COURT HAS NEITHER ACTUAL NOR CONSTRUCTIVE POSSESSION.

A serious conflict between rulings on this point by the Ninth Circuit Court of Appeals and other circuits now exists.

In *Layton v. Thayne,* 144 F(2)94 (Cert. denied), the Tenth Circuit Court of Appeals said:

> "When a Federal Court should stay its hand and require parties to litigate questions of purely State law in a State Court is a question that has received much consideration at the hands of the Federal Courts. The late decision of the Supreme Court in *Meredith v. Winter Haven,* 320 US 228, contains a very full discussion of the entire subject * * * Redemption itself is purely a ministerial act. It involves no exercise of judicial discretion."

The California Supreme Court has clearly and unequivocally declared that respondent is the *alter ego* of the State, because all of the property held or controlled by respondent is property of the State, designated a public trust, and dedicated for the "uses and purposes" of the Irrigation District act, among which purposes is the fulfillment of contracts to repay money borrowed.

Provident v. Zumwalt, 12 Cal. (2) 365;

El Camino L. C. v. El Camino I. D., 12 Cal. (2) 378;

Anderson-Cottonwood I. D. v. Klukkert, 13 Cal. (2) 191;

Metropolitan Water Dist. v. Riverside Co., 21 Cal. (2) 640.

The limitations embodied in Section 83, sub. (a) (b) (c) are self executing. The Federal Court can not "interfere" with fiscal affairs which involve the exercise of "political and governmental powers." The California Court in the *El Camino* case, supra, held that all

the affairs of districts created under the same law as respondent are "exclusively governmental."

These decisions by the California Supreme Court, all of which were after the *Bekins* case, construe the State as the real party in interest in this proceeding, and bring respondent within the rule announced in *Ex parte Ayers,* 123 U.S. 443 and *Cargile v. N. Y. Trust Co.,* 67 F(2d) 585, 589 "* * * even though the State had waived its immunity * * *".

The Constitution of California in Article IV, Section 31 provides:

> "The legislature shall have no power * * * to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever."

In 43 *Corpus Juris,* p. 211, is the following:

> "As the State may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal, so a municipal corporation, as a governmental agency, cannot surrender or contract away its governmental functions and powers, nor such functions as are regarded as mandatory, and any attempt to barter or surrender them is invalid."

The California Constitution in Article IV, Section 16 prohibits

> "* * * releasing or extinguishing in whole or in part, the indebtedness, liability or obligation of any corporation or person to this State, or to any municipal corporation therein."

The fact that petitioner, as the owner of original, unrefunded, non-callable bonds is a beneficiary and *cestui que trustent* can not affect the true character of the property in the possession of respondent, and its complete immunity from federal regulatory control.

The sole effect of the final decree, if it stands, will be to make a gift of "public money or thing of value" to the private holders of land titles within the district's taxable boundaries, at the expense of petitioner, whose bonds entitle him to have enforced the State's power to tax the value of land as promised when the bonds were issued in 1919 and 1922. (44 *Corp. Jur.* 1237-8.)

It is elementary that the power to tax the value of land is the highest attribute of State sovereignty and power. In The Federalist, No. XXXIII, Alexander Hamilton said:

> "Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not be legally opposed or controlled, *yet a law for abrogating or preventing the collection of a tax laid by authority of the State,* (unless upon imports and exports), *would not be the supreme law of the land, but a usurpation of power not granted by the Constitution.*" (Italics supplied.)

Although petitioner sought to raise this point in *Mason v. El Dorado,* 144 F(2) 189, it was based on different constitutional prohibitions than those here relied on, and the point was not presented to this Court in his petition for writ of certiorari No. 411, October term, 1944.

The rule is well settled that the Federal Courts are without power to change, modify or contravene statutory mandates which govern the levy and enforcement of direct taxes payable to a State or its political subdivision, and the final decree, as applied here operates to abrogate land taxes lawfully payable by private holders of land, as certainly as though the decree released them from such taxes directly. A clearer showing of a gift of "public money or thing of value" to individuals and corporations explicitly prohibited by Article IV, Section 31 of the California Constitution, and also prohibited by Clause 2, Section 3, Article 4 of the Constitution of the United States, in the light of the California decisions above cited, which construe the substantive and procedural rights of the parties, would be very difficult, if not impossible to submit to this Honorable Court.

V. THE LEGISLATURE OF A STATE CAN NOT, AFTER EXECUTING A TRUST CONFERRED ON IT BY THE CONSTITUTION, AND AFTER BORROWING MONEY UPON THE PLEDGE TO REPAY THE MONEY IN CONFORMITY WITH THE LAW, SUBSEQUENTLY REPUDIATE ITS CONTRACTS NOR CONSENT FOR THE FEDERAL GOVERNMENT TO ORDER THE CONTRACTS ANNULLED WITHOUT VIOLATING ARTICLE I, SECTION 10 OF THE FEDERAL, AND ARTICLE I, SECTION 16 OF THE CALIFORNIA CONSTITUTION.

Although 11 USCA 301-304 made State consent a pre-requisite to federal jurisdiction, that provision was left out of 11 USCA 403, and nothing said in the *Bekins* case modified the well settled rule that neither State consent nor submission can enlarge the power

of Congress. Yet this Court said in *Faitoute v. Asbury Park*, 316 U.S. 502, at 508, referring to Section 403

> "The bankruptcy power is exercised * * * only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by State law."

The State laws governing the powers and duties of respondent are in full force and effect, and the so-called State-consent act (Stats. 1939, Ch.72) does not purport to amend or to repeal any of the provisions in the law governing. As further proof of this, Stats. 1940, 1st E. Session, page 40, again validate the bonds owned by petitioner, in clear and unequivocal language.

The bonds owned by petitioner are certified irrevocably by the State Controller, and bear the great Seal of the State, as a lawful investment for all savings banks, insurance companies and trust funds in this State, as provided by Stats. 1931, p. 2263, as amended.

The California Court in *Bates v. Gregory,* 89 Cal. 387 (1891) said:

> "Any Act of the Legislature destroying the legal remedy upon a contract lawfully made, and binding upon the parties to it, impairs the obligation of contract, within the meaning of the Constitution, and is void."

The same basic question was involved in the following cases:

Shouse v. Quinley, 3 Cal. (2) 357;
von Hoffman v. Quincy, 4 Wall. 535;
Heine v. Board, 19 Wall. (86 U.S.) 665;

Murray v. Charleston, 96 U.S. 432;
Louisiana v. New Orleans, 102 U.S. 203;
Spencer v. Merchant, 125 U.S. 352;
Worthen v. Kavanaugh, 295 U.S. 56;
Wood v. Lovett, 313 U.S. 362;
Pryor v. Goza, 172 Miss. 46;
Enterprise v. State, 156 Ore. 623.

This point is ably construed by the Supreme Court of Ohio in *City of Cincinnati v. Seasongood,* 46 O. St. 296, 21 N.E. 630, at page 633, as follows:

> "A law can be repealed by the lawgiver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish—with a law all the effects which it had produced."

But, here, the California Legislature has not "abolished" the laws governing the powers and duties of respondent, nor the vested property rights embodied in the original, non-callable bonds owned by petitioner, and therefore the purported "consent" in Ch. 72, Stats. 1939, does not delegate any effective authority to the Congress to exercise control over the borrowing or taxing power of the State or its agency, when exercised.

In *Mugler v. Haus,* 123 U.S. 623, this Court said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."

In *Ex parte Virginia,* 100 U.S. 339, 347, it was said:

> "Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State."

Therefore, if the force and effect of the final decree here rests upon Chap. 72, Stats. 1939, it involves a violation of Article I, Section 10 of the Federal and Article I, Section 16 of the California Constitutions, and it ought to be set aside.

VI. THE FINAL DECREE, AS APPLIED, DEPRIVES PETITIONER OF A VESTED RIGHT TO COMPEL THE ANNUAL LEVY OF TAXES UPON THE VALUE OF LAND, AS REQUIRED BY LAW AND STATE DECISIONS, AND ABROGATES THE CONTRACT IN HIS TAX-SECURED BONDS IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE FEDERAL CONSTITUTION.

In support of this point, the following decisions are respectfully submitted:

Fallbrook v. Bradley, 164 U.S. 112;
Herring v. Modesto I. D., 95 Fed. 705;
Thompson v. Perris I. D., 116 Fed. 769;
Bd. of Supervisors v. Thompson, 122 Fed. 860;
Imperial Land Co. v. Imperial I. D., 173 Cal. 660;
Shouse v. Quinley, 3 Cal. (2) 357;
Selby v. Oakdale, 140 C.A. 171;

Provident v. Zumwalt, 12 Cal. (2) 365;
Moody v. Provident, 12 Cal. (2) 389;
Huddleston v. Dwyer, 322 U.S. 232.

In the recent case of *Commissioner of Corporations and Taxation,* 54 N.E. (2) 43, the Supreme Judicial Council of Massachusetts said:

> "Decision of the U. S. Supreme Court, in construing a federal statute was entitled to due deference and respect but was not binding on Supreme Judicial Court in construing Massachusetts Taxing Statutes."

The injunction in the final decree permanently restraining all holders of original, unrefunded bonds issued by respondent from access to the State Courts, is also unauthorized by any provision in the Bankruptcy Act, and appears to contravene the explicit prohibitions in Section 64(a), 83(c), and 28 U.S.C.A. 41(1) sub. (3).

In *Brown v. Gerdes,* decided February 7, 1944 by this Honorable Court, is the following:

> "For the supremacy clause does not give greater supremacy to the Bankruptcy Court over the free scope of the States to determine what shall be litigated in their Courts and under what conditions, than it gives with reference to rights directly secured by the Constitution, such as those guaranteed by the full faith and credit clause."

VII. WHETHER THE DEATH SENTENCE AND RESTRAINTS IN THE FINAL DECREE ARE REPUGNANT TO THE FEDERAL AND STATE CONSTITUTIONS.

The point here presented involves fundamental principles of constitutional law far beyond the immediate facts.

Although the amended Chapter IX was held to be "not unconstitutional" by this Honorable Court in the *Bekins* case, supra, nothing said in that case constitutes an abandonment or modification of the traditional doctrine of immunity, steadfastly adhered to from *McCullough v. Maryland,* 4 Wheat. 316, on every occasion that the question has been before this Court.

The Federal Income Tax Law is also constitutional, but there are still incomes flowing to private interests which are immune from Federal income taxation under the rule announced by this Court in *Pollock v. Farmers L. & T. Co.,* 158 U. S. 601, 630, as follows:

> "We have unanimously held in this case that so far as this law operates on the receipts from municipal bonds, it can not be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money and consequently repugnant to the Constitution."

The recent denial of petition for writ of certiorari by this Court to the Second Circuit of Appeals, after decision in *Shamberg v. Port of N. Y. Authority,* 144 F(2) 998, notwithstanding the fact that no portion of the sovereign power of taxation had ever been delegated by the States of New York or New Jersey to the authority, which fact places that State instru-

mentality in a basically different category from respondent, as a political subdivision, further justifies petitioner in submitting this question, in this case.

Receipts from the bonds meted a death sentence by the final decree are immune from the Federal Income Tax laws. 72 Op. A. G. 38. In its *Shamberg* decision, the Circuit Court made reference to the immunity of California Irrigation District bonds, and two rulings sustaining their tax exemption by the Attorney General of the United States.

In the printed hearings on H. R. 693 before the Committee on Interstate & Foreign Commerce of the House, 79th Cong., 1st Sess., Feb. 21, 1945, which bill seeks to clarify the S.E.C. Act, so that municipal bonds will not be subject to regulatory control by the S.E.C., directly or indirectly, Mr. David M. Wood, testifies:

> "We are confident that it is not the intention of Congress that State and Municipal financing be subject to the directives and control of a Federal commission. We are also confident that it is not the intention of Congress that this may be accomplished indirectly, by commission regulations of transactions in State and Municipal securities * * *
>
> The raising of revenue, whether through security financing or otherwise, is of prime importance to the government. Essential to the independent operations and home rule of the States and their Governmental units is freedom in their financial operations from regulatory jurisdiction—direct or indirect—by the Federal Government or its

bureaus and agencies. Such freedom is necessary at all times if the States are to retain their autonomy under our dual form of Government. Assurance of that freedom is especially important at this time as local governments plan and look forward to carrying out their post war financial programs."

In these same hearings on page 71 is printed a resolution by the American Bar Association, approved September 14, 1944, as follows:

"Whereas it has always been a well established principle of American constitutional law that the public finances and the financing of the States and their political subdivisions and instrumentalities are matters of purely State policy and should not be subjected to restrictions or regulation by any agency of the Federal Government;

Whereas, the Congress of the United States has steadfastly recognized this fundamental principle by refusing to confer on a Federal agency power to control such financing * * *"

Petitioner adopts the principles of constitutional law above as his main argument in support of the point here involved.

The prohibition against any "interference" with the exercise of political or governmental powers imbedded in Section 83(c), as interpreted and construed by the Eighth Circuit Court of Appeals in *Spellings v. Dewey,* 122 F. (2) 652, does not authorize the Court to issue orders that contravene the provisions in Section 64, sub. (a) (4) and 28 U.S.C. 41(1) sub. (3),

which the "death sentence" meted the bonds at bar, and the injunction restraining petitioner from "asserting any claim or demand whatsoever" in the State Courts does. (R. 11.)

The legal and practical effect of this decree is to make a gift of property designated a public trust and dedicated to the uses and purposes of the act (in which property petitioner has as bondholder a vested beneficial interest), to tax avoiding and tax evading private holders of land-titles, who are wholly without any right, title or interest in or to the windfall so given them.

The result to them would be in no respect different had the decree ordered respondent to levy and collect taxes upon the value of this land, at rates below those which the statutes applicable make mandatory, as construed in *Selby v. Oakdale,* 140 C.A. 171, and *Provident v. Zumwalt,* 12 Cal. (2) 365.

Differing completely from the usual ad-valorem taxes on real property, the taxes respondent is obligated to levy are in no sense taxes upon land, or buildings or on any improvements made by the landholder, but are laid only upon the value of land. A tax on land, that disregards fertility, location and other factors, would fall upon the land user, as user, and constitute a condition on the use of land. But a tax on the value of land, as provided in the law creating respondent is payable according to benefits received, and can not be shifted by the holder of title to a tenant, or anybody else, and it can not increase the cost of living. In short, the bonds at bar consti-

tute a State ceiling on the rent which any landlord can privately appropriate, but which the final decree, if it stand, will circumvent. The taking of petitioner's property will in no way benefit the general welfare, but will only enrich those seeking unearned increment.

CONCLUSION.

Because respondent contended in his motion to dismiss that "each and every point raised by appellant in this purported appeal" had already been considered and finally adjudicated by the Circuit Court, petitioner has been put in a position which made it necessary to rebut that argument with a discussion of the basic principles of constitutional law involved in each point, and to respectfully submit that until these fundamental questions of constitutional law arising as an actual controversy under Section 83 have been construed in an opinion by this Court, they have not been "finally adjudicated".

It is the position of petitioner that the basic points have been finally adjudicated by this Court, and adversely to the views of respondent, and that the Circuit Court erred in granting the motion to dismiss without giving a ruling on any of the points raised in the appeal, and without allowing petitioner to submit a brief arguing the points, in the customary way.

By its summary affirmance, on the motion to dismiss, the Circuit Court of Appeals acted in a manner

that would appear to bring its judgment in conflict with 4 C.J.S., Section 1377, as follows:

> "On a motion to dismiss, the appellate court will not ordinarily consider or determine the merits of the appeal on questions involving its merits."

In *Hunter v. Rector of St. Ann's Chapel,* 137 So. 850, 851, 173 La. 454, it was said:

> "On the trial of motions to dismiss appeals, the question whether the judgment appealed from is correct or incorrect is not an issue; the only issue presented being whether or not the appellant is entitled to the appeal as a matter of law."

In *Keys v. Mother Lode Ext. Mines,* 212 Cal. 612, 299 Pac. 524, it was held that the Court will not determine, on a motion to dismiss an appeal, the question of whether the appeal was frivolous, if determination of that question requires such an examination of the record and the appeal on its merits as amounts to a substantial advancement of the cause.

In W. J. Somers v. Smith, 45 C.A. 703, it was held that, upon a motion to dismiss, the Court will not consider controverted or doubtful questions of law or fact.

Rule 38 of the Supreme Court, Section 5, subsection (b) is as follows:

> "Where a Circuit Court of Appeals * * * has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

For the above reasons it is respectfully submitted that the writ of certiorari should be granted, the judgment of the Court below reversed, and the final decree of the District Court set aside.

Dated, San Francisco, California,
April 23, 1945.

Respectfully submitted,
J. R. MASON,
Petitioner in Propria Persona.